IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.M.JOSEPH

WEDNESDAY, THE 17TH JANUARY 2007 / 27TH PAUSHA 1928

WP(C).No. 33372 of 2005(W)

PETITIONER:

A.KUNJAMMA H.S.A (MATHS) ST.THOMAS HIGH SCHOOL, PUNNACODE, POOYAPPALLY P.O., KOLLAM -37.

BY ADV. SRI.N.D.PREMACHANDRAN.

RESPONDENTS:
----

1. **STATE OF KERALA REPRESENTED BY THE SECRETARY, GENERAL EDUCATION (A) DEPARTMENT, THIRUVANANTHAPURAM.**
2. **THE DEPUTY DIRECTOR OF EDUCATION, KOLLAM.**
3. **THE DISTRICT EDUCATIONAL OFFICER, KOTTARAKKARA.**
4. **THE MANAGER, ST.THOMAS HIGH SCHOOL, PUNNACODE, POOYAPPALLY P.O., KOLLAM- 691 537.**
5. **SMT.ROHINI MATHAN, HSA, ST.THOMAS HIGH SCHOOL, PUNNACODE, POOYAPPALLY P.O, KOLLAM- 691 537.**

W.P.(C). NO.33372/2005:

6. P.M.MATHAI, RETIRED TEACHER- IN -CHARGE ST.THOMAS HIGH SCHOOL PUNNACODE, RESIDING AT PANAYIL THEKKE VEEDU, NEDUMPARA P.O, NEDUMPARA, KOLLAM- 691 580.

BY ADV. SRI.GEORGE POONTHOTTAM,
SRI.M.V.THAMBAN,
GOVERNMENT PLEADER SMT. M.R. SREELATHA.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 17/01/2007,ALONG WITH W.P.(C). NO. 34493/2005,THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

W.P.(C). NO.33372/2005:

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P.1: COPY OF THE ORDER PASSED BY THE R.2. DTD. 19/03/2005.

EXT.P.2: COPY OF THE LETTER DTD. 11/04/2005 SENT BY THE PETITIONER TO THE R.4.

EXT.P.3: COPY OF THE LETTER DTD. 02/06/2005 SENT BY THE PETITIONER TO THE GOVERNMENT.

EXT.P.4: COPY OF THE LETTER RECORDING THE PETITIONER'S PROTEST IN POSTING THE 5TH RESPONDENT AS TEACHER-IN-CHARGE.

EXT.P.5: COPY OF THE COMMUNICATION DTD. 02/06/2005 SENT BY THE PETITIONER TO THE R.3.

EXT.P.6: COPY OF THE LETTER DTD. 18/07/05 ADDRESSED TO THE R.4.

EXT.P.7: COPY OF THE RELINQUISHMENT MEMO SUBMITED BY THE PETITIONER IN THE PROFORMA PROVIDED BY THE MANAGER.

EXT.P.8: COPY OF THE NOTICE RECEIVED FROM THE R.1.

EXT.P.9: COPY OF THE APPEAL MEMORANDUM AFTER ERASING THE ORDER ENDORSED ON IT BY THE EDUCATION MINISTER DTD. 15/04/2005 ALONG WITH A COVERING LETTER WAS RCEIVED BY THE PETITIONER.

EXT.P.10: COPY OF THE ARGUMENT NOTES SUBMITTED BY THE PETITIONER BEFORE THE R.2.

EXT.P.11: COPY OF THE ORDER PASSED BY THE R.1. DTD. 23/11/2005.

//TRUE COPY//

prv.

K.M.JOSEPH, J.

- -

WP.(C) Nos.33372 & 34493 OF 2005

- -

Dated this the 17th day of January, 2007

JUDGMENT

Common questions arise in these writ petitions and they are being disposed of by a common judgment.

2. Petitioner in W.P.(C)33372 of 2005 is one Smt. A. Kunjamma, hereinafter referred to as Smt. A.Kunjamma. Petitioner in W.P.(C) 34493 of 2005 is one Sri. P.M.Mathai, hereinafter referred to as Sri. P.M.Mathai. Sri. P.M.Mathai is in fact the sixth respondent in W.P.(C) 33372 of 2005. The fifth respondent in W.P.(C) 33372 of 2005 is one Smt. Rohini Mathan. In both the writ petitions the order passed in revision by the Government, which is Ext.P11 in W.P.(C) 33372 of 2005 and Ext.P3 in the other writ petition is challenged. In W.P.(C) 34493 of 2005, Ext.P1 is also challenged.

3. The facts not at dispute are as follows:

Smt. A. Kunjamma entered service on 28.7.1976. Smt. Rohini Mathen entered service on 3.6.1974. Smt. Rohini Mathen however came to be retrenched on 25.5.1992 and she was deployed to a

Government School till 30.9.1997. Thereafter she rejoined on 1.10.1997. Sri. P.M.Mathai joined on 4.7.1977. However he came to be retrenched on 8.12.1989 and was under deployment till 6.9.1996. Thereafter he rejoined in the School on 6.9.1996. If the total period of service in respect of Smt. Rohini Mathen and Sri. P.M.Mathai are considered including the period when they were under retrenchment and working in another School, Smt. Rohini Mathen had 31 years of service and Sri. P.M.Mathai had 28 years of service. As far as Smt.A. Kunjamma is concerned, it is not in dispute that she was never retrenched. A retirement vacancy arose in the post of Headmaster on 1.6.2003. The Manager appointed Sri. P.M.Mathai. Smt. Kunjamma gave Ext.P7 (in W.P.(C) 33372 of 2005) relinquishment. It was to be valid for the period from 1.6.2003 to 31.5.2005. The DEO refused to approve the appointment on the ground that there was no seniority list and a senior claimant was not considered. Manager preferred an appeal, which came to be disposed of by Ext.P1 in both writ petitions. Therein the Deputy Director found that the Manager has not produced the combined seniority list duly approved by the Educational Officer.

Therefore he proceeded to consider the matter on the basis of the service book of all the three teachers. He found that though Smt. Rohini Mathen and Sri.P.M.Mathai had commenced their continuous service on 3.6.1974 and 14.7.1977 respectively they were retrenched on account of division fall. It was noted that Smt.A.Kunjamma commenced continuous service with effect from 28.7.1976 and continued in service without any interruption. Relying on the decision reported in **Rahelamma v. State of Kerala** (1997(2) K.L.T. 429), it was noted that a teacher, who is on deployment cannot reckon the service for the purpose of seniority in any grade in any unit he had worked previously. It is further noted that the relinquishment given by Smt. A.Kunjamma could not be accepted as it was conditional/temporary. Thereafter the Deputy Director proceeded to dispose of the appeal holding that the appointment of Sri. P.M.Mathai could not be approved. It was also confirmed that Smt. A.Kunjamma was the only eligible teacher to be promoted against the post of Headmistress that fell vacant with effect from 1.6.2003 by virtue of her continuous service.

4. Sri. P.M.Mathai came to retire on 31.5.2005. It is not in dispute among the parties that Sri.P.M.Mathai continued as Headmaster till the date of his retirement. Smt.A. Kunjamma raised a claim as evident from Ext.P2 for appointment as Headmistress. In Ext.P2 no doubt it is stated that as her temporary relinquishment was found to be against the Circular of the DPI it is withdrawn and that the request was to consider her in terms of Ext.P1 order. It was followed by Exts.P3, P4, P5 and P6 requests. Smt. Rohini Mathen and Mr. Mathai filed revisions, which came to be disposed of by the orders which are impugned in these writ petitions. By the impugned order Government has held that Smt. Rohini Mathai shall be deemed to have been promoted and appointed as Headmistress with effect from 1.6.2003 notionally with all consequential benefits except for pay and allowances and that she will become eligible for due pay and allowance only with effect from 1.6.2005 since from 1.6.2003 to 31.5.2005 Sri.P.M.Mathai was officiating as Headmaster. In arriving at the said conclusion Government placed reliance on the decision of the Full Bench of this court reported in **Sasidharan Nair v. State of Kerala**

(2003(1) K.L.T. 998) besides the decisions of the Apex Court.

5. Heard learned counsel for the parties. Learned counsel appearing for Smt.A. Kunjamma would submit as follows:

He would submit that the reliance on the Full Bench decision by the Government in the impugned order is completely without any basis. He would submit that it is inapplicable. He would submit that the question which fell for consideration before the Full Bench had no connection with the facts to be decided in these cases. The Full Bench in the decision reported in **Sasidharan Nair's Case** (2003(1) K.L.T. 998) was considering the question in the context of the following facts: The appellant therein had joined as HSA on June 21, 1980. Thereafter he was transferred from the original School to another School in 1986. He joined in 1986. The sixth respondent had joined the School to which the appellant was transferred earlier than the date on which the appellant had joined. Therefore the sixth respondent came to be shown as senior to the appellant. When a retirement vacancy of Headmaster arose, the claim of the appellant that he was the only eligible HSA was not accepted. Instead, the sixth respondent, who was shown as senior

to him, but who had not completed the prescribed period of 12 years continuous service as HSA was directed to be promoted. It was in the context of the said facts that the Full Bench proceeded to examine the effect of transfer under Rule 10 of Chapter XIVA in the context of Rules 37, 44 and 44A of Chapter XIVA of KER. After elaborately considering all the aforesaid provisions besides drawing support from various decisions of the Apex Court, the court came to the conclusion that as far as eligibility for promotion to the post of Headmaster is concerned, the service which is rendered by a teacher in the previous School is not wiped out. The court proceeded to hold as follows:

> "10. A perusal of R.37 shows that the seniority of a teacher in a school is determined with reference to the length of continuous service in that school. Under R.44, the appointment to the post of Headmaster has to be 'ordinarily' made according to seniority in the rank of the High School Assistant. R.44A on which the basic controversy hinges lays down the condition of eligibility for promotion to the post of Headmaster. It inter alia provides that for appointment to the post of Headmaster, (1)the High School Assistant should have a minimum service of 12 years; (2) this should be continuous; (3) it

should be as a graduate High School Assistant and (4) the candidate should have passed the prescribed test. On a perusal of the rule, it is clear that the service has to be continuous but it need not be in one unit or the same school. This position becomes further clear from the fact in the Explanation to R.44A, 'Graduate Service' has been defined to mean "all service of a teacher as High School Assistant". It is not confined to one school only. Thus, on a plain construction of the rule, it appears that the service rendered by a teacher in different school can be combined for determining his eligibility for promotion to the post of Headmaster. However, the essential precondition is that it must be after acquisition of prescribed qualification. Still further, it has to be continuous. However, it is not necessary that the service should be in the same school.

14. The contention cannot be accepted. Firstly, it deserves notice that the seniority determined under R.37 does not make the person eligible for promotion. It only embodies the order in which the names are to be considered. While considering the names, the Manager can promote only such person who fulfils the qualification. Secondly, the rules do not contemplate that the benefit of past services shall be completely wiped out on transfer. For example, under R.13 a specific provision has been

made by which the pay of a teacher who is transferred from one school to another is duly protected. It has been clearly provided that a teacher who is transferred shall continue to receive the pay that he was drawing in the school from which he has been transferred. This condition has been laid down despite the provision that the "rank in the new school will be fixed next below the junior most teacher in that particular grade in that school....". Thus it is clear that the rule permits a junior person in the seniority list ti draw a higher pay than persons senior to him. Just as the benefit of service is not lost for the purpose of pay, it is also not wiped out for the purpose of promotion. Resultantly, on a harmonious construction of the rules, we find that the only loss that a teacher suffers on transfer from one school to another under a different management is that he is placed at the bottom of the list of teachers in the pay scale of the post held by him. In other words, his pay, scale of pay and qualifying service are not affected.

19. Thus on a consideration of the provisions of the statutory rules as well as the binding precendents, we find that the benefit of the service rendered by a teacher in one school is not lost on his transfer to another school under a different management when his claim/eligibility for promotion has to be considered. The view as taken by the

> two Division Benches in 1988(1) K.L.T. 402 and W.A. No. 214 of 1998 is not correct. It is, thus, overruled."

However, it is also pertinent to note paragraph 16 of the said judgment. It reads as follows:

> "It is undoubtedly correct, as observed by the Bench, that the benefit of service in the previous school is not given in the matter of seniority. However, on this basis it cannot be said that the service is completely wiped out. This is so, because, as already noticed, the benefit is granted even for the purpose of pay. Thus, despite being junior, a teacher who has been transferred from another school is given the advantage of previous service and is allowed to draw a higher pay. Still further, if the view taken by the Division Bench were to be upheld, R.44A of Chapter XIVA shall have to be re-framed to provide that the twelve years of service 'should be in the same school.' It is a well-settled rule of interpretation that if the language of a provision is clear and unambiguous, the court shall not add words thereto. Thus, the plain words of the Rule have to be seen. There being no gap in the Rule, no words can be added."

This judgment came to be referred to with approval in a later Full

Bench decision reported in **Pushparaj v. Manoharan** (2006(2) K.L.T. 951). Paragraphs 17 and 18 of the judgment are apposite and they are extracted hereunder.

> "17. We are in complete agreement with the finding of the Full Bench in Sasidharan Nair's case that the rationale behind the rule is not one for avoiding heart burning to the persons who are senior to the graduate teacher, but is one for laying down an eligibility condition in addition to the 5 years' experience in teaching after acquisition of B.Ed. Therefore, in fact as rightly pointed out by the earlier Full Bench, dissatisfaction and heart burning are on the other side when an ineligible person as per the Rule itself is preferred overlooking the under-graduate teacher.
>
> 18. The facts that in R.44A there is an explanation explaining the meaning of the term 'graduate service' and such an explanation is absent in R.45 do not make the position any the different. Even without the explanation in R.44A, as a general rule, the past service in another school is liable to be reckoned for the purpose of both R.44A and R.45 since the service mentioned in both Rules are eligibility conditions for promotion without any relevance to seniority and therefore the service in another school can

> be excluded only for reckoning seniority and not for any other purpose including fixing the eligibility conditions for promotion. The view of the Division Bench, which referred the case to the Full Bench, that 'five years experience in teaching after acquisition of B.Ed.' alone is the eligibility condition in R.45, does not appear to be correct. The other condition that for preferring the graduate teacher, he should have half of the service of the senior-most undergraduate teacher is also an eligibility condition for promotion, in addition to the five years experience stipulated."

Placing reliance on the Full Bench decision reported in **Sasidharan Nair's Case** (2003(1) K.L.T. 998) by the first respondent is therefore criticised by learned counsel appearing for Smt.A.Kunjamma for the reason that the question according to the learned counsel, which was decided by the Full Bench related to eligibility with reference to the number of years of service, which alone was the question decided. Further more he would contend that the Full Bench decisions have made it very clear that as far as seniority is concerned, the persons who were appointed on transfer would lose the seniority by virtue of the transfer taken on request. He would place reliance on the Division

Bench decision reported in **Rahelamma v. State of Kerala** (1997(2) K.L.T. 429). The facts of the case were as follows:

The facts are stated in paragraph 2, which is extracted hereunder.

> "The facts in short are as follows: Upper Primary School, Inchivilla was formerly an L.P.School. When it became a U.P.School the then senior-most under-graduate teacher one P.D.Mariamma was promoted as the Headmistress of the School. The said appointment was sent up for approval to the A.E.O., Kollam. The A.E.O. Declined approval on the ground that the appellant herein was having more than one half of the service of the senior-most under-graduate teacher and she being a graduate, was entitled to get appointment to the post of Headmistress of the School. On the date of occurrence of the vacancy of Headmaster, Smt. P.D.Mariamma had 23 years and 4 months of service in the School and the appellant Rahelamma had only 10 years and 2 months service in the same School. Of course, she had 9 years of graduate service in other school as a protected teacher. According to AEO, the total service of the appellant is to be taken inclusive of 9 years graduate service in other school. Against the order of AEO, the Manager went in appeal before the Deputy Director of Education. The Deputy

Director concurred with the finding arrived at by the AEO. The Manager challenged the same in the Original Petition."

In the course of the judgment the court referred to the judgment of a learned Single Judge reported in **Manager, Mar Sleeba U.P.School v. State of Kerala** (1990(1) K.L.T. 626) and thereafter proceeded to hold as follows:

> "On an analysis of various provisions contained in the KER, it is clear that a teacher who has been retrenched from service for want of vacancy is to be treated as not in service of that School even if he is deployed to work in another school under the scheme of protection given to the retrenched teachers. The protected teacher is allowed to work in another school, but his service cannot be counted for the purpose of seniority vis-a-vis the teachers working in the parent school. A teacher working on deployment as a protected teacher may be entitled to get increment and other service benefits for the period he had worked as a protected teacher. Under R.37 of Chap.XIVA of the KER, he cannot reckon his service for the purpose of seniority in any grade in any unit he had worked previously, namely, in his parent school. The service he has rendered as a protected teacher

> cannot be taken into consideration as service for the purpose of R.45 of Chap.XIVA of the KER. For a qualified graduate teacher to claim preference over the senior-most qualified under graduate teacher, he should have got service equal to half of the period of service in the school under the same management."

Adv.N.D.Premachandran submits that in fact this decision has not been overruled by the Full Bench and therefore the principle enunciated by the Division Bench in **Rahelamma's Case** continues to hold good. He would refer to the finding rendered by the Government in the impugned order. In the impugned order Government, after posing the correct question has observed as follows:

> "The only point to be decided in this case is whether the petitioner teacher retrenched and deployed to another school by way of protection due to division fall will lose her seniority to be considered for the post of Headmaster. The Full Bench of the Hon'ble High Court in Writ Appeal No.1972/2002 has undoubtedly established that a teacher on his transfer under a different management does not lose the benefit of service rendered by him in the previous school for the purpose of determining his eligibility for promotion to the post of Headmaster. By this dictum laid

> down by the Full Bench of the Hon'ble High Court, the stand taken by the Division Bench in Rahelamma v. State of Kerala that under Rule 37 of Chapter XIVA KER the service rendered by a protected teacher cannot be reckoned for the purpose of seniority in any grade in any unit he worked in the parent school will not stand."

He would therefore submit that the aforesaid finding is palpably unsustainable. As far as seniority is concerned, it will be governed by the provisions of Rule 37 which contemplates the criteria of continuous service in any grade in the same unit, he submits.

6. Per contra, learned counsel appearing on behalf of Smt. Rohini Mathan would contend that the decision of the Full Bench as appreciated by the Government indeed confers a right on Smt. Rohini Mathan to count her service which she had rendered in the School to which she had deployed also. Learned counsel invited my attention the decision of this court reported in **Usha Devi v. State of Kerala** (2002 (1) K.L.T. 615). Therein the matter came before the Division Bench on the basis of a reference by a learned Single Judge. The question which came up for consideration can be appreciated on a perusal of paragraph

1, which is extracted hereunder.

> "Common questions arise in these three writ petitions. When O.P. No.31283of 2000 had come up for hearing, a learned Single Judge had referred the matter for decision by the Division Bench, and the two other cases also got posted along with them. Mr.Justice Gafoor had been invited to the decisions in Rahelamma v. State of Kerala (1997(2) K.L.T. 429) and Manager,Mar Sleeba U.P.School v. State of Kerala (1990(1) K.L.T. 626) as confirmed by W.A. No.207 of 1990 which has laid down that a retrenched teacher, though on protection, on going back to the school was obliged to surrender seniority, in favour of subsequent appointees. The learned Judge was of the opinion that the said line of decisions required a fresh look, as the quoted decisions had not taken note of the circumstance that such a protected teacher came back and continued in the school, on the basis of the original appointment order, and the effect thereof might be a legal fiction that the date of appointment remained unaltered."

Learned counsel referred to me paragraph 6, wherein the court has extracted the stand taken by the Government in its counter affidavit, which reads as follows:

"It may also be interesting to note the averments made by the first respondent-Government and especially extracts from paragraph 4 of the counter affidavit filed:

"Protected teachers cannot be equated at par with a 51A claimant who has been thrown out from service for want of vacancy. Protected teachers are working in another school on working arrangement without break in service and they retain lien in their parent school (vide G.O.(Ms) No.104/69/G.Edn.). They were deployed as protected teachers due to circumstances beyond their control. So unlike teachers voluntarily seeking transfer to other schools or transferred to Government schools, the protected teachers retain their lien in the parent school. The Act and Rules do not contemplate forfeiture of past service of a protected teacher in the parent school as well as the service rendered as protected teacher. So, for the purpose of R.37 (1) of Chapter XIVA, Kerala Education Rules, a protected teacher is having continuous service in the same grade, but in another unit retaining the lien in the parent school. Since their lien is retained in the parent school they do not acquire lien in the transferred school. As such in the case of protected teachers 'Unit' as mentioned in R.37(1) of Chapter XIVA shall be construed as also the school in which they have worked as protected teachers."

Thereafter in paragraph 7 the court held as follows:

> "The Government has explained their stand taken in Ext.P9. Though the stand runs counter to the judgment in Mar Sleeba U.P.School v. State of Kerala (1990(1) K.L.T. 626), it is not expedient to upset the decision on the above circumstance alone. We are in full agreement with the reasoning given by Ext.P9, viz., that the order has attained finality by efflux of time. The petitioner is disabled from challenging Ext.P1 seniority list, as a statutory finality has set in. The fortuitous circumstance that she continued in the school undisturbed might have come to her advantage at some point of time, but by acquiescing to the position as prevailing in 1995, the petitioner has irrevocably lost her right to assert for seniority."

Paragraph 11 of the said judgment reads as follows:

> "It is not possible to countenance such an argument in the terms of the express language employed in the Rule. The said provision reads as following:
>
> "44A.(1) Subject to the provisions contained in sub-r.(1) of R.44, the minimum service qualification for appointment as Headmaster, in Aided Complete High Schools/Training Schools shall be twelve years of continuous graduate service with pass in the test in the

> Kerala Education Act and the Kerala Education Rules and a pass in Account Test (Lower) conducted by Kerala Public Service Commission."
>
> Whereas R.37 while referring to seniority of a teacher specifically refers to 'service in that grade in that unit', such a stipulation is conspicuously absent in the latter rule."

He would submit that therefore the matter is not free from doubt. He would submit that the service rendered by the teacher who was appointed in the year 1974, after she was retrenched and deployed in Government School should not be eschewed from determining seniority. Learned counsel also relied on the decision reported in **Sasidharan Nair's Case** (2003(1) K.L.T. 998). He would submit that paragraphs 12 and 13 should be read to appreciate the findings in paragraph 14. He would also submit that it is not as if under Rule 44 the matter is peremptorily to be decided only with reference to seniority as the word 'ordinarily' tempers the mandatory nature of the command in Rule 44 and it can be relaxed in appropriate cases.

7. He would further submit that this court should take note of the fact that petitioner has admittedly sent Ext.P7. And he also invited my

attention to the following facts: The vacancy of Headmaster arose on 1.6.2003. Sri. P.M.Mathai was appointed and Ext.P7 is dated 6.6.2003. Sri. Mathai continued till 31.5.2005. The DEO refused to approve the appointment on the ground that the claim of Smt. Rohini Mathen was not considered besides there being no seniority list. It is only for the first time that by Ext.P2 petitioner raised a claim. He would submit that Smt. A.Kunjamma cannot be permitted to apparently rely on the relinquishment and yet seek to derive benefit out of Ext.P1 order. He would point out that petitioner has not challenged the appointment of Sri.Mathai.

8. Learned counsel appearing on behalf of Sri.Mathai would contend that the impugned order cannot be sustained. He contends that the reasoning in the impugned order is unsustainable. According to him Sri. Mathai would rank as senior to Smt. Rohini Mahtan. This is for the reason, according to him, that even though Smt. Rohini Mathan was appointed earlier than him originally, Smt. Rohini Mathan came to be admittedly retrenched and she rejoined only on 1.10.1997. As far as Sri.Mathai is concerned, even though he joined later than Smt. Rohini

Mathan originally and he came to be retrenched on 8.12.1989, he came rejoin on 6.9.1996. He would therefore contend that for the purpose of Rule 37 in conjunction with Rules 44 and 45, it is continuous service in the School which is crucial for determining the question of seniority. If that is so, he would submit that it is not the entire service which is to be considered, namely, the service including the service in the original School followed by service in the School to which teacher is deployed and thereafter finally the service rendered after rejoining following retrenchment. According to him what is conclusive is the service rendered continuously in the unit and in the context of the admitted facts of this case he submits that such continuous service can as between Smt. Rohini Mathan and Sri. Mathai be the service rendered after they rejoined following the period of retrenchment. If that is so, he would contend that it is clear that the length of continuous service of Sri.Mathai is longer than that of Smt.Rohini Mathen. This is as Sri.Mathai rejoined on 6.9.1996 while Smt.Rohini Mathen rejoined only on 10.10.1997. Therefore in such circumstance, he would contend that the order of the Government is illegal and does not take into

consideration the mandate of Rule 37. Both he and counsel for Smt. A.Kunjamma would also rely on the decisions reported in **George v. State of Kerala** (1998(2) K.L.T. 637) and in **Rajasree v. Secretary to Government** (2000(2) K.L.T. 248). In the said judgments this court took note of Note to Rule 44. In **Rajasree's Case** it was held as follows:

> "The only provision in the Kerala Education Rules is Note to R,44(1) of Chapter XIVA of K.E.R which says, whenever, the Manager intends to appoint a person as Headmaster other than the senior claimant, the Manager shall obtain a written consent from such senior claimant, renouncing his claim permanently. Such consent shall have the approval of the Educational Officer concerned. There cannot be any permanent relinquishment to the post of Headmaster. That apart, we are of opinion that relinquishment can only be of an existing right. Mere chance of promotion is not a right and if it is not a crystallised right, there is no question of any relinquishment."

In **George's case** the court held as follows:

> "The expression "whenever the Manager intends to

> appoint"would show that whenever manager overlooks the claim of a senior teacher to be appointed as Headmaster, manager has to get a written consent from such senior claimant renouncing his claim permanently. In other words, there cannot be any permanent relinquishment to the post of Headmaster."

Therefore it is contended that Ext.P7 relinquishment made by the petitioner is to be treated as relinquishment in regard to the particular vacancy and not to the post as there cannot be permanent relinquishment to the post as held by this court. If that is so, he would submit that the temporary nature of the relinquishment could not be relied on as was done by the Deputy Director in Ext.P1 order to rob it of its efficacy in so far as the vacancy which arose on 1.6.2003 is concerned. In other words his contention is that the appointment made by the Manager of Sri. Mathai is perfectly valid and therefore deserves to be approved.

9. No doubt, learned counsel for Smt.Rohini Mathen would contend that the effect of Ext.P7 relinquishment has not been dealt with in the impugned order. Learned counsel for Smt. Rohini Mathen would

further contend that in fact the institution is actually a minority institution. He points out the stand taken by her in the counter affidavit. I am not impressed by his argument for the simple reason that such a contention is not taken by the Manager before any authorities and it cannot be permitted to be taken for the first time by the petitioner in proceedings under Article 226.

10. The question that falls for consideration is the validity and correctness of the stand taken by the Government in finding that in the aftermath of the decision of the Full Bench in **Sasidharan Nair's Case** (2003(1) K.L.T. 998) the question as to seniority between the teachers in question should stand decided in favour of Smt. Rohini Mathen. In my view, the impugned order is palpably unsustainable in regard to the finding that the question as to seniority between the teachers can be decided in favour of Smt. Rohini Mathen on the basis of the aforesaid Full Bench decision. As already noted, the question which actually arose before the Full Bench was in the context of certain facts which I have already set out in the judgment. That was a case where the teacher who was already working in the School to which the appellant

was transferred did not possess 12 years service. The service of the appellant in the previous school prior to the transfer was eschewed. Under Rule 44A the condition of eligibility for appointment as Headmaster is that a teacher should possess 12 years experience. It is in the said context that the court found in favour of the appellant and found that service rendered by the appellant in the earlier School was not wiped out. The court however made it clear relying on the Apex Court decision that question of seniority will have to be decided on the basis that a person taking a request transfer will have to be satisfied with bottom seniority. The Government has apparently proceeded on a misapprehension about the two distinct concepts. The question of seniority is not the same as the question of eligibility declared in Rule 44A. Rule 44A insists on a person possessing 12 years experience. It is not the requirement of the law that the said 12 years experience should be one gained in the same unit. But that is a far cry from saying that the service rendered in another school will count for determining seniority in the unit. Seniority is a matter which falls to be decided with reference to the unambiguous terms of Rule 37. The position is

clear in the decision reported in **Usha Devi's Case** (2002(1) K.L.T. 615) at paragraph 11, which I have already extracted. The same result inevitably follows on a perusal of the judgment of the Full Bench reported in **Sasidharan Nair's Case** (2003(1) K.L.T. 998) at paragraph 16 which I have already referred to besides paragraphs 16 and 17 of the judgment reported in **Pushparaj v. Manoharan** (2006(2) K.L.T. 951). Apart from all these decisions, the decision of the Division Bench in **Rahelamma's Case** continues to hold the field as far as the question that falls for consideration in this case is concerned. It cannot be in dispute that the Full Bench has not specifically referred to it and it is not seen overruled or disapproved. In **Leelabai v. Anandavally** (2002 (3) K.L.T. 942), this court held as follows:

> "The moment a teacher is thrown out he ceases to be in the service of the School. Only right protected is for a preference for reappointment in the same post."

I would therefore think that the finding rendered by the Government in the impugned order in favour of Smt.Rohini Mathen is unsustainable and therefore it is only to be quashed.

11. As far as the question relating to relinquishment is

concerned, no doubt it is not seen specifically dealt with by the Government. I must proceed on the basis that this question was not raised before the Government as it is not seen dealt with by the Government. Even permitting Smt.Rohini Mathen to raise this contention, I do not think that a decision in her favour can be rendered on this point. As held by a Division Bench of this court in the decision reported in **Rajasree's Case** (2000(2)K.L.T.248) besides the decision reported in **George v. State of Kerala** (1998(2) K.L.T. 637) the law does not contemplate a permanent relinquishment in regard to a post. What is contemplated is relinquishment in regard to to a particular vacancy. Therefore when Smt.A.Kunjamma gave Ext.P7 relinquishment it was valid from 1.6.2003 to 31.5.2005, which apparently was given on the basis that Sri. Mathai was to retire on 31.5.2005. Therefore the contention of the counsel for Smt.A.Kunjamma that as regards the vacancy which arose on 1.6.2005, the relinquishment, even treating it as a permanent relinquishment in the sense in which it can be understood in view of the Division Bench judgment, it will not in any way dis-entitle her from raising a claim in

relation to the vacancy which fell open on the retirement of Sri.Mathai. Further there is a question as to whether it is Smt.A.Kunjamma, who is senior visa vis Smt. Rohini Mathen. He would therefore contend that in view of the principle that is continuous service as contemplated in Rule 37 which is relevant and in the context of the period of retrenchment undergone by Smt. Rohini Mathen, it is clear that it is Smt.A.Kunjamma, who is entitled to be appointed. I would think that there is force in what is contended for by Smt. A.Kunjamma in this regard. No doubt, a perusal of Ext.P2 would give the impression that Smt. A.Kunjamma was seeking to approbate Ext.P1 order, wherein it is found inter alia that the temporary nature of the relinquishment rendered it unacceptable. Moreover Ext.P2 is followed by Exts.P3 to P6. Whatever that be, in view of the law laid down by this court the fact remains that the relinquishment can be understood as the relinquishment in regard to the vacancy which arose on 1.6.2003.

12. In W.P.(C) 34493 of 2005 filed by Sri.P.M.Mathai, he has challenged the order of the Deputy Director produced as Ext.P1. He has contended that the view expressed by the Deputy Director is

perverse and it is against the pronouncements of the court and the post of Headmaster arises when the Headmaster vacates the office due to retirement or other reasons and that when the teacher relinquishes his rights, he has to be considered again when the vacancy arises next time. No doubt, counsel for Smt. Rohini Mathen would contend that under the Note relinquishment given by Smt.A.Kunjamma is not approved.

13. It is clear that among the teachers it is Smt.A.Kunjamma who was the senior most qualified who was eligible to be appointed as the Headmaster as and when the vacancy arose on 1.6.2003. She had given Ext.P7 purporting the relinquishment of the right to be appointed for the period from 1.6.2003 to 31.5.2005. Understanding the relinquishment in the sense in which a valid relinquishment can be understood in the light of the decisions of this court, it cannot be brushed aside as invalid for the reason that the relinquishment is not permanent in the sense that it is not a relinquishment without any limit as to time. It is declared that Ext.P7 relinquishment is valid. No doubt under the Note to Rule 44 the relinquishment must have the approval of the Educational Officer. Apparently, in Ext.P1 order the Deputy

Director has proceeded on the basis that Smt.A.Kunjamma is entitled to be appointed with reference to 1.6.2003. It is submitted on her behalf that there was no occasion for her to challenge the order as it was in her favour. But counsel for Smt.A.Kunjamma also submits that the relinquishment given as Ext.P7 ought to have been accepted and therefore she cannot be declared to be entitled to appointment with effect from 1.6.2003. In other words, it is the case of Smt.A.Kunjamma that Ext.P7 relinquishment made by her is valid in the eye of law and she may be considered, it is contended, in respect of the vacancy caused by the retirement of Sri.P.M.Mathai on 31.5.2005. Upon Ext.P7 relinquishment being approved, it is Sri.P.M.Mathai who would be entitled to appointment as Headmaster from 1.6.2003 and he would be entitled to continue till 31.5.2005. Upon the retirement of Sri.Mathai on 31.5.2005, in view of my finding that the order of the Government in revision cannot be sustained, it is Smt.A.Kunjamma who would be entitled to be appointed as Headmistress on 1.6.2005. This is for the reason that Smt.A.Kunjamma is entitled to seniority over Smt.Rohini Mathen in view of the findings which I have entered into in

this judgment. As between Mr. Mathai and Smt. Rohini Mathen, in view of Rule 37, it is Sri.Mathai who is senior to Smt. Rohini Mathen. In such circumstances Ext.P11 in W.P.(C)33372 of 2005 and Ext.P3 in W.P.(C) 34493 of 2005 shall stand quashed.

14. As far as Ext.P1 order passed by the Deputy Director is concerned, while I approve of the principle on the basis of which the Deputy Director has found that Smt.A.Kunjamma is senior to both Smt.Rohini Mathen and Sri.P.M.Mathai, the finding therein that Ext.P7 relinquishment cannot be accepted for the reason that it is temporary cannot be accepted and Ext.P1 to that extent cannot be sustained. Government Pleader is unable to point out any reason for not approving the relinquishment apart from the reasoning given in Ext.P1 which I have already found unsustainable. Therefore it is clear that Smt.A.Kunjamma is entitled to have Ext.P7 relinquishment approved by the Educational Officer within the meaning of Note to Rule 44. Likewise, in view of the fact that Smt.A.Kunjamma must be treated to have relinquished her rights, she cannot be granted benefit of appointment as Headmaster from 1.6.2003 as ordered in Ext.P1.

Therefore Ext.P1 in W.P.(C) 33372 of 2005 to the extent mentioned above shall stand quashed. In the light of my findings above, there will be a direction to the Manager of the School to pass order of appointment of Smt.A.Kunjamma in the light of the findings entered by me in this judgment. It shall be done within a period of three weeks from the date of receipt of a copy of this judgment. Further, there will be a direction to the DEO, Kottarakkara to pass appropriate orders in the light of the observations made by me in this judgment in regard to the approval of Ext.P7 relinquishment given by Smt.A.Kunjamma within a period of three weeks from the date of receipt of a copy of this judgment and further pass orders on the approval of appointment of the petitioner in W.P.(C) 34493 of 2005 within a further period of two weeks thereafter in accordance with law and in the light of the observations contained in the judgment.

(K.M. JOSEPH, JUDGE)

sb

K.M.JOSEPH, JJ.

- - - - - - - - -- -

W.A. No. OF

- -- - - - - - - - - - - - - - -

JUDGMENT

Dated this the day of February, 2006.